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IN THE

Supreme Court of the United States

October Term, 1959

No. 571

In the Matter of the Applications
of
The BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 3 of the TOWN OF OYSTER BAY, NASSAU COUNTY, and of JANE J. SERPE, GLORIA A. DUNAIF and IRIS E. LAVAC, Taxpayers of Union Free School District No. 3 of the Town of Oyster Bay, Nassau County,

Appellants,

For orders under Article 78 of the Civil Practice Act to review, vacate and set aside the determinations of JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York.

Appellee,

(1) Laying out Central School District No. 3 of the Town of Oyster Bay, Nassau County, and (2) that an election shall be held for the purpose of organizing Central School District No. 3 of the Town of Oyster Bay, Nassau County, and vacating the notice of election signed by said Commissioner.

(Consolidated Proceedings)

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

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BATAVIA TIMES LAW PRINTERS
BATAVIA, N. Y.

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(Consolidated Proceedings)

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

The Appellee, James E. Allen, Jr., as Commissioner of Education of the State of New York hereby moves to dismiss the appeal herein.

The grounds for appellee's motion to dismiss the appeal are as follows:

I. The appeal is not timely.

II. None of the five questions purported to be presented by the appeal herein are before this Court.

III. The appeal herein does not present a substantial Federal question.

The following sections of the New York State Education Law are pertinent to this cause:

Section 1801, subdivisions 1 and 2

"1. The commissioner of education is hereby authorized and empowered to lay out central school districts for the establishment of central schools to give instruction in elementary or elementary and high school subjects and to fix, determine and define the boundaries of said districts as hereinafter provided.

"2. The commissioner is authorized and empowered to make and enter in his office orders laying out territory in new central school districts or annexing to existing central school districts territory not contained within a city school district in a city having a population of more than ten thousand inhabitants, and not contained within a city school district having a full valuation of taxable real estate per public school pupil residing in the district of more than fifteen thousand dollars; provided, however, that no territory contained within a city school district in a city having a population of ten thousand inhabitants or less may be included in new central school districts or annexed to existing central school districts after July first, nineteen hundred fifty-five. The commissioner of education is authorized and empowered to make and enter in his office orders dissolving and annexing a central school district or districts to another central school district, pursuant to the provisions of subdivision two of section eighteen hundred two of this

chapter. The commissioner in laying out such central school districts and in fixing and defining the boundaries thereof shall include only territory of suitable size conveniently located for the attendance of pupils and having a sufficient number of pupils for the establishment of a central school. The commissioner shall designate all central school districts by name, number and such other description as he shall deem proper."

Section 1804, subdivisions 5 and 6

"5. Nothing herein contained shall be construed to deprive any existing school district of the property belonging to such district, or to affect the indebtedness of said district. An existing district within the meaning of this article shall be construed to mean a district that lies within the boundaries of a central school district. Each such existing district shall be deemed to continue to exist in law for the purpose of paying all its just debts, including obligations lawfully issued prior to the organization of such central school district, together with all interest thereon as the same shall fall due. In levying the annual school tax upon the property of such central school districts, the board of education shall also assess and levy upon the taxable property of each such existing district which has an outstanding indebtedness, an addition sum sufficient to pay all of such indebtedness which shall fall due during the school year for which the tax is levied less any sum received by such central school district and apportioned and credited to the existing school district pursuant to the provisions of subdivision four of section eighteen hundred six of this article."

"6. The board of education shall not sell or otherwise dispose of the property of any such existing district except with the approval of a majority of the qualified voters of such existing district present and voting upon the question at a meeting of such voters duly called by such board of education; provided, however, that upon the expiration of five years from the date of discontinuance of a school, pursuant to section one thousand eight hundred five of this chapter, the board of education may, in its discretion, without

a vote by such qualified voters upon such question, sell or otherwise dispose, in the manner provided by law, of such a school or other building previously used for school purposes and the real property on which it is situated. For that purpose the proceeds of such sale or disposal of property belonging to such existing district, after deducting the cost of repairs or improvements made after the organization of the central school district, shall be used for the payment of the portion payable by such existing district of any outstanding indebtedness of such existing district which shall be due and payable or which may thereafter become due and payable. Any balance remaining after the payment of such indebtedness shall be apportioned among the taxpayers of such existing district as they appear upon the last completed town or city assessment roll preceding the date of sale, unless the voters of such existing district by a majority vote of those present and voting at a special district meeting called for the purpose shall vote to turn over the proceeds of such sale or disposal of such property to the central district to be used for the benefit of the central district. Any balance of funds remaining in the treasury of the several districts included within the central school district on July first next following the date of the establishment of such central school district, after paying all outstanding obligations then due and payable, shall be turned over to the treasurer of the central school district within thirty days thereafter. That portion of the balance representing tax money in each district shall be apportioned among the taxpayers of the existing district as they appear on the last completed town or city assessment roll prior to July first of the first year the central school board levies a tax, unless the voters of an existing district by a majority vote of those present and voting at a special school district meeting called for the purpose, prior to August first following the date of the organization of the central school district, shall vote to turn over all the balance to the central district to be used for the benefit of the central district. That portion of the balance representing public money shall become available for use by the board of education of the central school district. If

the voters of the existing district do not authorize the transfer of the entire balance to the central school district it shall be the duty of the board of education of the central school district to allocate such balance to tax money and public money in the proportion that the average amount of the tax levied during the preceding five years and the average amount of public money apportioned during the preceding five years bear to the sum of these averages. The board of education shall refund the tax money so allocated to the taxpayers of each constituent district on or before the last day of the first year of operation as a central school district. The title to all property erected or otherwise acquired after the organization of such central school district shall be vested in the central district, irrespective of the location of such property."

Section 1805

"§ 1805. Limitation of powers of central school district

All central school district shall have the same powers and be subject to the same limitations that are now conferred or imposed by law upon union free school districts as provided by this chapter except that in each existing district maintaining a school at the time of centralization the central school district shall continue to maintain such school for the instruction of pupils therein up to and including the sixth elementary grade for a period, commencing on the day of centralization, of not less than five years, unless the legal voters of such existing district at a meeting of such voters duly called by the board of education of such central school district shall, by majority vote of those present and voting at such meeting, determine to discontinue the school in such existing district prior to the expiration of such minimum five year period and in such case the school shall be discontinued accordingly. At any time after the expiration of such minimum five year period the board of education of the central school district may, by a majority vote of the members thereof, discontinue such school in such existing district, provided, however, that in the event the legal voters of such

existing district shall have determined not to discontinue such school at a meeting of such voters duly called upon such question, the board of education of the central school district may not discontinue such school until after the expiration of a period of five years following such determination by such legal voters. The district officers of the several existing districts shall remain in office until August first next following organization of such central school district for the purpose of conducting and maintaining school in the several districts, the carrying out of contracts in force at the time of the organization of such central school district, of paying all just debts and obligations of such existing districts due and payable on or prior to said August first, and of levying and collecting taxes raised or necessary to be raised for any of said purposes. For the purposes of the apportionment and payment of public moneys, notwithstanding any other provisions of this article, any apportionments and payments made during the school year in which such central school district was organized shall be apportioned and credited to the existing districts. Any apportionments made and paid during the school year next succeeding the date of the organization of such central school district shall be made and credited to the central school district but the amounts thereof shall be determined upon the basis of the continuance of the existing districts as separate districts during the entire school year in which such central school district was organized."

Section 1806

"1806. State aid building quota

1. Any central school district organized under the provisions of this article shall from the time of its organization receive from the state, in addition to the apportionments provided in sections thirty-six hundred two, thirty-six hundred three, thirty-six hundred twenty-seven and forty-four hundred five of this chapter, an apportionment to be known as a building quota, the amount of which shall be determined according to the cost of the building, including site purchase,

grading and improvement of site, original furnishings and equipment, machinery and apparatus, professional fees and other incidental expenses, which cost shall be approved by the commissioner, as calculated in this subdivision, provided that any building quota established prior to July first, nineteen hundred fifty-five, shall continue to be computed and paid pursuant to the provisions of this chapter as in effect at the time of the establishment of such quota.

"a. For the purpose of calculating the building cost, which shall be known as the 'ceiling' the commissioner shall ascertain the number of pupils enrolled in grades one to twelve, inclusive, of the central school district, or, where a building quota is to be established during the first year of operation of the central school district, the number of public school pupils of the existing districts comprising such central school district, enrolled in such grades, at the close of the school year next preceding the date the work is commenced and shall add thereto, as a computed kindergarten enrollment, a number of pupils equal to the average number of pupils enrolled in grades one to six, inclusive, in such school districts. The pupil enrollment thus enumerated may be increased or decreased five per centum by the commissioner to compensate for school population trend in each central district just prior to the approval of a bond issue for a central school building.

"b. (1) Upon the basis of the pupil enrollment thus ascertained, there shall be computed for each pupil shown thereby the sum of twelve hundred dollars plus an amount not exceeding two hundred forty dollars per pupil on account of the cost of the site purchase, grading and improvement of site, original furnishings, equipment, machinery and apparatus, professional fees and other incidental costs approved by the commissioner, as a cost unit for buildings housing grades kindergarten through six, and the sum of sixteen hundred dollars per pupil plus an amount not exceeding four hundred dollars per pupil on account of the cost of such incidental expenses, as a cost unit

for buildings housing grades seven through twelve, provided, however, that the sum of sixteen hundred dollars shall be so computed without the additional allowance for such incidental expenses in case of such latter buildings if the district is scheduled for reorganization in accordance with the master plan for school district reorganization of the joint legislative committee on the state education system, as amended by the commissioner, and until such reorganization is accomplished. The pupil enrollment multiplied by the cost unit shall constitute the cost of the building in a central school district. The cost unit herein specified, except for the additional allowance for incidental expenses shall be based upon the cost of material and labor on July first, nineteen hundred fifty-five, and may be increased or decreased by the commissioner in proportion to the fluctuation in the costs of material and labor after July first, nineteen hundred fifty-five. Schedules indicating such fluctuations, expressed in percentage terms of increase or decrease in the basic cost unit of twelve hundred dollars or sixteen hundred dollars, as the case may be, shall be prepared by the state industrial commissioner monthly and delivered to the commissioner. (2) A building quota for additional construction in a district in which a building quota shall theretofore have been established shall be computed as follows: after computing the building quota pursuant to paragraph a and subparagraph (1) of paragraph b and paragraph c of this subdivision and after ascertaining the raw building quota percentage by dividing the building quota by the ceiling, all previous ceilings, or, where the costs allowed were less than such ceiling, such costs, shall be recomputed in terms of the dollar value of the cost unit as of the time of the establishment of the building quota for the additional construction. Such previous ceiling or such approved costs allowed, as so recomputed, shall be deducted from such ceiling in determining the final quota percentage for the additional construction. In the case of approved costs for building quotas established prior to May second, nineteen hundred forty-one, such costs shall be adjusted by multiplying them

by the ratio of the dollar value of the cost unit at the time of the additional construction to the dollar value of the cost unit as of May second, nineteen hundred forty-one

"c. The central school district shall contribute to the cost of the building and incidental expenses thus calculated, an amount equal to six per centum of the actual value of taxable property in the central district and the state shall contribute the remainder of such cost, thereby making the building quota to be apportioned and paid by the state the amount obtained by multiplying pupil enrollment by cost unit minus six per centum of the actual value of taxable property.

"d. Notwithstanding the provisions of paragraphs b and c of this subdivision, any central school district, for which a new building quota is to be established after July first, nineteen hundred fifty-five, and in which school construction has been or shall be approved pursuant to law and the general construction contract therefor awarded prior to July first, nineteen hundred sixty, shall have the right to have its building quota computed under the provisions of former section eighteen hundred six of this chapter as in effect on June thirtieth, nineteen hundred fifty-five and in the following manner:

"(1) A raw building quota percentage shall be computed as if construction had begun during the school year nineteen hundred fifty-four—fifty-five, using the enrollment as of the end of June of nineteen hundred fifty-four, the actual valuation used in the computation of regular state aid for the school year nineteen hundred fifty-four—fifty-five, and the dollar value of the cost unit as of June, nineteen hundred fifty-five:

"(2) thereupon a new ceiling shall be computed based upon the date on which construction actually began;

"(3) the ceiling so computed shall be the new ceiling, except in a district in which a building quota shall theretofore have been established, in which case the

ceiling so computed shall be used to determine the balance of ceiling. Such ceiling, or balance of ceiling, as the case may be, shall then be used to adjust the raw building quota percentage determined in accordance with subparagraph (1) of this subdivision.

"e. The actual value of taxable property shall be ascertained by taking the assessed valuation of such real property as it appears upon the last assessment roll of the town or city in which such property is located, after revision as provided by law, and by applying thereto the ratio, as determined by the state board of equalization and assessment, which such assessed valuation bears to the actual value of such property.

"f. The building cost as herein computed shall not prohibit a central district from exceeding the computed building cost, but any increase shall be borne by the local district.

"g. If a central school district decides to plan for only a part of the enrollment, either in a new building or in an addition to an existing building, the building formula shall be applied except that the local district and state shall contribute in terms of the ratio established if the entire enrollment had been planned. If the entire enrollment is not planned in the initial outlay, that shall not prohibit the district on some future date from receiving state assistance for various buildings or additions for the enrollment beyond the enrollment already cared for. Under no circumstances shall the state contribute more than its share that would result from the building formula prescribed in this subdivision.

"h. In the event that federal aid shall be granted to any school district in the construction of any school building, the amount of such federal aid shall not be included in the sum actually expended in computing the amount of such building quota.

"i. The building quota herein provided for shall be paid only on projects costing more than thirty-five hundred dollars and only in case the commissioner of

education shall approve the proposed erection, enlargement, remodeling or repair of school buildings in advance of the expenditure of the sum required therefor, and in case the plans and specifications for such erection, enlargement, remodeling or repairs shall be approved by him as provided by law.

"j. The board of education of such central school district shall cause to be presented to the commissioner of education, in the manner and at the time required by him, a statement as to the amounts expended by such district for the erection, enlargement, remodeling or repair of school buildings.

"2. In the event that a school district acquires a school building by gift or otherwise without cost to the district, and the plans and specifications of such building have been approved by the commissioner of education, such commissioner shall apportion to such district a building quota computed according to the building formula prescribed in subdivision one of this section as approved and determined by such commissioner. The board of education of such district and its successors shall hold such quota in trust, invest and reinvest the same in obligations of the state of New York, of the United States and or obligations of counties, cities, towns and villages of this state, which have not defaulted in the payment of any of their obligations, either as to principal or interest, within five years next preceding the investment and use the income therefrom for the care and maintenance of such school building and the school grounds upon which it is located.

"3. If the cost of the erection, enlargement, remodeling or repair of school buildings is paid out of the proceeds of bonds or other evidences of indebtedness issued as provided by law, such building quota shall continue to be paid, for the year for which the apportionment is made, on the basis of the amount of the principal and interest of such bonds or evidences of indebtedness paid by such district during such year, where it has so been paid on and before July first, nineteen hundred fifty-six; provided, however, that in

all other cases the apportionment of such building quota based on bond or capital note issues, shall be paid during the school fiscal year in which the installment of principal and interest on which such quota is based falls due. Receipts from the building quota shall be applied first to the payment of the principal and interest which becomes due on such bonds in the year in which the quota is received.

"For the purposes of this section the payment of bond anticipation notes made by a central school district from a budgetary appropriation shall, for the apportionment of such building quota, be deemed to be a payment of bonds in anticipation of which the said notes were issued, providing that the total amount of bonds issued and sold by such central school district shall be reduced by an equivalent amount.

"4. There shall also be paid to each central school district containing a school district which continues to exist after becoming a part of such central school district, pursuant to the provisions of section eighteen hundred four of this chapter, for the purpose of paying any outstanding indebtedness incurred by it prior to July second, nineteen hundred forty-seven, a sum of money equal to the amount necessary to pay such indebtedness of such school district, including interest, which shall fall due during such school year, less two mills on each dollar of actual valuation of the taxable property in such existing district. The first payment to central school districts hereafter organized shall be made for and during the first school year for which the board of education of the central school district levies a tax. The central school district shall apportion and credit to the existing school district the sum so received."

Section 1514

"§ 1514. Property of districts consolidated

"When two or more districts shall be consolidated into one, the new district shall succeed to all the rights of property possessed by the annulled districts."

Section 1517

"§ 1517. Indebtedness of certain dissolved districts

"Whenever any school district is dissolved pursuant to the provisions of section fifteen hundred five of this article and annexed to an adjoining district or adjoining districts or consolidated as provided in section fifteen hundred twelve, the indebtedness of any such district evidenced by bonds or notes or relating to school building construction shall thereupon become a charge upon the enlarged district formed by such annexation or consolidation. The board of education or trustees of such enlarged district shall raise by tax an amount sufficient to pay any such indebtedness of such district as the same shall become due."

Section 1518

"§ 1518. Continuance of dissolved districts for payment of debts

"Though a district be dissolved, it shall continue to exist in law, for the purpose of providing for and paying all its just debts, except as provided in section fifteen hundred seventeen; and to that end the trustees and other officers shall continue in office, and the inhabitants may hold special meetings, elect officers to supply vacancies and vote taxes; and all other acts necessary to raise money and pay such debts shall be done by the inhabitants and officers of the district."

Section 314

"§ 314 Master Plan For School District Reorganization

"The commissioner of education is hereby authorized to continue the investigations, study and review carried on by the joint legislative committee on the state education system in order to bring up to date the Master Plan For School District Reorganization (legislative document number twenty-five of nineteen hundred forty-seven); to make such studies and surveys as are necessary to review periodically and main-

tain such plan currently; to hold hearings in relation to affected areas for the purpose of eliciting the expression of opinion, cooperation and assistance of the inhabitants of such areas; and to make recommendations for school district reorganization so as to assure the most efficient and economical provision of educational facilities for such areas. Such recommendations shall be principally directed toward the reorganization of areas in and around the city school districts of cities having less than one hundred twenty-five thousand inhabitants, the reorganization of the remaining common and union free school districts not included in such urban and suburban areas and the reorganization of the smaller central school districts. The commissioner of education is hereby authorized, further, to amend such master plan as established by such joint legislative committee on the basis of his investigations, study and review, by orders made by him and entered in his office. Nothing herein contained shall delay, or interfere with, the exercise of the powers of the commissioner of education vested in him by articles thirty-seven or forty or sections fifteen hundred twenty-four, fifteen hundred twenty-five or fifteen hundred twenty-six of the education law."

Statement of Facts

Originally two proceedings were brought herein under Article 78 of the New York Civil Practice Act. The first proceeding *and the only one involved in this appeal* was for an order seeking to set aside an order of appellee, Commissioner of Education, *laying out Central School District No. 3 of the Town of Oyster Bay, Nassau County, as a central school district*, said order, dated March 29, 1957, being issued pursuant to Section 1801 of the New York State Education Law. This order included Union Free School District No. 3 (hereinafter referred to as "Brookville"), which is one of the petitioners herein; Union Free School District No. 4, and Union Free School District No.

6. All three districts are located in the Town of Oyster Bay, Nassau County, Long Island, and form a contiguous and compact area.

The second proceeding under said Article 78 of the New York Civil Practice Act had the purpose of setting aside the order of the appellee, Commissioner of Education, *calling the election of the qualified voters of the newly laid out Central School District No. 3* for the determination of the voters as to whether or not they wished to approve the establishment of said Central School District. This proceeding dealt purely with a matter of interpretation of State law and has no bearing on the appeal.

The said two proceedings were subsequently consolidated.

The election of the qualified voters of said Central School District No. 3 was later held on May 4, 1957, and resulted in a vote of 1864 in favor and 519 opposed.

The consolidated proceeding resulted in a decision in favor of appellee, on that part of the consolidated proceedings here pertinent, at Albany County Supreme Court, Special Term, September 5, 1957. Appellee was reversed on the second part of the consolidated proceedings, which is not here pertinent, at the same time.

Cross-appeals were filed by both parties to the Appellate Division of the New York State Supreme Court, Third Judicial Department, which resulted in a unanimous affirmance of the Special Term determination in favor of appellee, in that part of the consolidated proceedings which is here pertinent. As to the other part, the Appellate Division reversed the determination at Special Term, so that at this stage both proceedings were determined in

favor of appellee. The decision of the Appellate Division was rendered in July, 1958 (6 A. D. 2d 316).

The said decision of the Appellate Division of the New York State Supreme Court, in turn, was affirmed by the New York State Court of Appeals, without opinion, on May 29, 1959, two Judges dissenting on procedural grounds (6 N. Y. 2d 871).

In the meantime a number of applications were made by appellants herein for intermediate stay orders, which, however, were not granted, except that the Justice at Special Term, prior to his own decision, granted a limited interim stay, which, however, allowed the election on the question of the establishment of the central school district to take place.

After the final determination of the State Court of Appeals on May 29, 1959, appellants herein made a motion in said State Court of Appeals for reargument and for an amendment of the remittitur of the State Court of Appeals, so as to show that a Federal question had been involved and was necessarily passed upon in the said State Court of Appeals.

This motion of appellants herein, insofar as it sought reargument was denied by the State Court of Appeals on July 8, 1959 (6 N. Y. 2d 983, 999).

Insofar as the motion sought an amendment of the remittitur, the State Court of Appeals on July 8, 1959 granted the motion and added the following language:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, *viz.:* Appellants *contended that section 1801 of the Education Law was unconstitutional* in that it deprived taxpayers of their property

without due process of law in violation of the Fourteenth Amendment. The Court of Appeals held that said section was constitutional and that appellants' constitutional rights were not violated." (Emphasis supplied)

Furthermore, following the final determination of this cause by the New York State Court of Appeals, a proceeding was commenced by appellants herein to resettle the order of the Supreme Court, Special Term, making the order of the State Court of Appeals that of the State Supreme Court (in relation to eliminating from said order reference to the *vacatur* of a previous lower Court stay order—see *supra*).

After argument this order was made, eliminating the said *vacatur*. Thereafter contempt proceedings were brought by appellants herein against appellee, *et al.*, for allegedly violating the interim stay order of the Supreme Court, Special Term. This proceeding was argued on July 24, 1959 and was decided at Special Term on July 27, 1959 in favor of appellee.

Thereafter appellants herein sought a stay order from Judge Van Voorhis of the New York State Court of Appeals, which was argued on July 30, 1959 and decided in favor of the appellee on the same date.

Immediately thereafter appellants herein sought a stay order from a Justice of this Court, which was decided by Mr. Jusfice Harlan in favor of appellee in August, 1959. Subsequently, on October 6, 1959, appellants herein made and served their notice of appeal herein to this Court.

It will be noted that the notice of appeal is dated on a day 130 days later than the final determination of the State Court of Appeals.

ARGUMENT

I.

The appeal is not timely.

The appeal was not commenced within the time prescribed by statute. The appellant has 90 days from the date of the final order and judgment of the highest Court of the State of New York in which to commence an appeal to the United States Supreme Court under 28 U. S. C. 2101 (c). The order and judgment of the State Court of Appeals appealed from herein was made by the said Court of Appeals on May 29, 1959. Thus, the time for the appellants to appeal to this Court commenced on May 29, 1959. The notice of appeal herein was received by the appellee on October 7, 1959, which was more than 90 days from May 29, 1959, *i.e.*, 130 days thereafter, or 40 days beyond the expiration of this statutory period.

Appellants seem to assume that the 90-day period for filing a notice of appeal to this Court was tolled by their motion dated June 25, 1959, in the State Court of Appeals for reargument of the appeal which was determined originally by the said Court of Appeals on May 29, 1959. The said motion for reargument was denied on July 8, 1959, and the motion for amendment of the remittitur so as to show the presence of a Federal question was granted on the same day, *i.e.*, July 8, 1959.

The time to appeal to the United States Supreme Court commences to run, in the case of an appeal from a final order of the Court of Appeals of the State of New York, on the date of the final order and judgment of the Court of Appeals which is sought to be appealed from (*Department of Banking v. Pink*, 317 U. S. 264).

In the State of New York there is no period prescribed by statute or rule for the filing of a motion in the Court of Appeals for reargument of a matter previously determined by the Court of Appeals. Such motion can be made at any time after the Court of Appeals makes its final order and judgment. (*Franklin Bank Note Co. v. Mackey*, 158 N. Y. 683; Rule XX of the Rules of Practice of the Court of Appeals of the State of New York; Cohen and Karger, on Powers of the New York Court of Appeals, § 186; Carmody-Wait Cyclopedia of New York Practice, Vol. 9, Page 405; 84 A. L. R. 597, note VII.)

It has been held that a *timely* motion for reargument or rehearing will toll the running of the time to appeal to the United States Supreme Court (*Department of Banking v. Pink, supra; Pfister v. Northern Illinois Finance Corp.*, 317 U. S. 144). It has also been held that the filing of an *untimely* petition for rehearing or reargument if denied does not operate to extend the time to appeal (*Wayne United Gas Co. v. Owens-Illinois Glass Co.*, 300 U. S. 131, 137).

Since there is no statutory period for filing a motion for reargument in the Court of Appeals in the State of New York, there actually is no such thing as a timely or untimely petition for rehearing. It would seem, therefore, that a motion for reargument in the Court of Appeals, if not granted by the Court of Appeals, should not be deemed to extend the time to appeal to this Court.

It is to be noted further that the motion for reargument was based entirely on appellants' statement that "until [the] determination by [the New York Court of Appeals, appellants] did not know the basis for the Commissioner's determination." This argument had been presented below.

however, and the Appellate Division of the New York State Supreme Court, Third Judicial Department, unanimously had disposed of the same as follows:

> "The answer interposed by the Commissioner in our view is a sufficient pleading. Although petitioners argue that there is no allegation that the Commissioner considered the detailed statistical and fiscal studies and projections attached to the answer in making his determination, his pleading with respect of the most detailed of them is that they were 'studies made by the respondent', which means he made them, or as head of the department, had them made for his use, which amounts to the same thing. We are of opinion that the determination of the court at Special Term dismissing this portion of the petition as now consolidated was correct."

The Special Term determination referred to was in pertinent part as follows:

> "The studies made by the commissioner furnish ample support for the finding implicit in his determination that the size of the area and the number of pupils therein, present and prospective, are suitable and sufficient. 'The geography of the area and the means of communication existing therein establish reasonable basis for a finding that it is conveniently located for the attendance of pupils.' These determinations were for the commissioner to make. Absent a showing that they are arbitrary or capricious, the court may not interfere."

The New York Court of Appeals affirmed by a vote of five to two the affirmation by the Appellate Division of this determination.

It is patent, therefore, that appellants knew from at least the time of the Special Term decision, *i.e.*, September 5, 1957, what the basis of appellee's determination was. Hence, the grounds of their motion for reargument in the New York Court of Appeals had already been argued

before and passed upon by three Courts and presented no new matter. In fact, appellants' allegations in this respect seem wholly unsupportable. As was pointed out in the State Courts, there is no dispute on the facts involved in this case, since all the pertinent factual materials are matters of public record, such as the number of pupils in the area laid out by appellee as a central school district, the number of pupils of each of the component districts of the centralization attending public schools and those attending non-public schools; the valuation of taxable property of the area; the need of the community in general for the construction of school facilities; available highways, absence of natural barriers; the fact that appellee's order merely combined certain existing school district without a change in the pre-existing boundaries, and many others; that all of the Village of Old Brookville, with the exception of a tiny segment thereof, which latter part is a part of "Brookville" (a district included in appellee's order), is now a part of another central school district. That the State Constitution requires by Article XI, § 1, that every school child in the State be provided with a school system where he may attend without the payment of tuition; that the State policy since 1925 has been to provide central school districts for all nonurban areas, so that the constitutional mandate may be carried out with the maximum possible equality of educational opportunity for the youth of the State as between urban and nonurban areas; that by Section 314 of the State Education Law appellee has been charged with the duty to initiate "the reorganization of the remaining common and union free school districts * * *." Appellants are charged with knowledge of the State law and policy; that in fact all the foregoing were facts and circumstances well known to appellants from the inception of this litigation.

It would appear that the reasoning of this Court in *Federal Trade Commission v. Minneapolis Honeywell Co.*, 344 U. S. 206, together with the holding of this Court in *Wayne United Gas Co. v. Owens-Illinois Glass Co., supra,* would be governing. There must be an end to litigation, and there must be definite time limits upon which litigants may depend. If a person wishes to appeal a final order of the Court of Appeals to this Court, such person should pursue his remedy expeditiously and file the notice of appeal within 90 days of the final order. If such person does not do so, but instead files a motion for reargument, the words of this Court are applicable: "A defeated party who applies for a rehearing and does not appeal from the judgment or decree within the time limited for so doing, takes the risk that he may lose his right of appeal, as the application for rehearing, if the court refuse to entertain it, does not extend the time for appeal."

It is respectfully submitted that in New York, where a person is unsuccessful in a matter finally determined by the Court of Appeals, such person should, if he wishes to appeal to this Court, file his appeal within 90 days of such final order, or in the alternate file an application for reargument in the Court of Appeals, knowing full well that if the motion for reargument is denied that the filing of such motion for reargument does not extend the time for taking an appeal to this Court.

If the appellant is successful in his contention that this appeal is timely it will lead to a situation where an order and judgment of the Court of Appeals can always be appealed to this Court, even 100 years later, by merely filing with the Court of Appeals an application for reargument and upon the denial of such application or dismissal of the motion the person would have 90 days thereafter in which

to appeal to this Court. Here appellee made an order laying out a central school district on March 29, 1957 and the voters thereof voted to establish such central school district on May 4, 1957, by a vote of 1864 against 519, and the matter is still held up because of this litigation. The Constitution of the State of New York requires the Legislature provide for a continuously operating system of public schools and the interest of our school children requires that there be a known termination date of the litigation here in question. Delay serves no one; harms our youth. All parties are entitled to know and rely upon the final determination of the courts without there being a perpetual question of the right to appeal this matter. In sum:

(a) Reargument is purely discretionary with the New York State Court of Appeals under New York State law;

(b) The final order and judgment of the Court of Appeals had already fully adjudicated the matter after three main arguments and three decisions before three different Courts, and the same allegations had been urged upon all these Courts over and over again.

Hence, the order of the Court of Appeals must be considered to be final within the *per curiam* exposition of the applicable principle by this Court in the *Pink* case, *supra*, page 268. Consequently, in spite of the motion for reargument in this case, the time to appeal to this Court must be considered to run from May 29, 1959, and the appeal herein, consequently, is not timely.

2. Insofar as appellants' motion sought an amendment of the remittitur, the same was granted. The New York State Court of Appeals amended the remittitur as set forth in the Statement of Facts, *supra*.

It is well established that an amendment of a remittitur of the New York State Court of Appeals does not extend the time to appeal to this Court, inasmuch as such an amendment merely explains what the determination of the Court of Appeals actually was without in any way challenging, or interfering with, the finality of the Court's decision. The granting of such a motion involves no reconsideration of the case. It merely certifies that a stated Federal question had been presented and passed upon, without in any way suspending the finality of the decision of the Court of Appeals (*Department of Banking v. Pink, supra*). Consequently the granting of the motion to amend the remittitur does not toll the 90-day period for appeal to this Court.

It is respectfully submitted, therefore, that the appeal herein is not timely and must be dismissed *on that ground alone*.

II.

None of the five questions purported to be presented by the appeal herein are before this Court.

While it is appellee's position that POINT I, *supra*, fully disposes of the appeal herein, this point of argument shows additional reasons why none of the questions sought to be raised by appellants are even before this Court in any event, even if they had been raised in a timely fashion.

The remittitur of the Court of Appeals herein was amended on the motion of appellants herein so as to show that a Federal question was presented to, and necessarily passed upon by the New York State Court of Appeals. The amendment added the following language:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, *viz.*: Appellants contended that *section 1801 of the Education Law was unconstitutional* in that it deprived taxpayers of their property without due process of law in violation of the Fourteenth Amendment. The Court of Appeals held that *said section was constitutional* and that appellants' constitutional rights were not violated." (Emphasis supplied)

Appellants must rely on this language of the amended remittitur in order to convey jurisdiction to this Court in the present cause. It follows that this Court's jurisdiction herein is limited by the language of the amended remittitur.

Hence, the sole question which would be before this Court if the appeal herein had been timely would be whether or not the Court of Appeals erred when it declared Section 1801 of the New York State Education Law to be not in violation of the Fourteenth Amendment to the United States Constitution, in that it does not, contrary to said Amendment, deprive the taxpayers of that district of their property without due process of law.

Appellants, however, now seek to raise five questions which are patently not covered by the language of the amended remittitur.

The gist of these five questions is as follows:

"(1) Does *Article 37* of the New York Education Law *(not Section 1801, as stated in the amended remittitur)* violate the due process clause of the Fourteenth Amendment, because Section 1804, subdivision 5, thereof provides that the component school districts in a central school district retain both their property and their debt?

(2) Does *Article 37* of the New York Education Law *(not Section 1801, as stated in the amended remittitur)* violate the due process clause of the Fourteenth Amendment, because *the article* does not set forth standards adequate to guide appellee in exercising the administrative power granted to him thereunder?

(3) Does appellee's action in *initiating* the establishment of this central school district (consummated by the later vote of the voters of the district) violate the Fourteenth Amendment, because the "majority of the taxpayers" in appellants' district (a component of this central district) oppose its inclusion therein, and because appellee never made any "findings of fact", or held a trial in the matter, and because appellee never explained his reasons for so doing, in detail, to appellants personally, even though none of these things are required under the New York statutes, and even though all the factual materials on which appellee's action was based are matters of public record?

(4) Is *Article 37* of the New York Education Law *(not Section 1801 thereof, as stated in the amended remittitur)*, together with Article 78 of the New York Civil Practice Act (the constitutionality or unconstitutionality of which was never even referred to by appellants in any State Court, much less questioned by them there), in violation of the due process clause of the Fourteenth Amendment, because "*they impose a tax* upon the individual appellants" (emphasis supplied), even though neither said Article 37 nor, certainly, said Civil Practice Act imposes a tax on anybody—taxation being imposed, on the basis of action of the qualified voters of the central school district having established such central district, by the board of education of said central district, including representation from

appellants' district, through at least one member of such board of education, and because of the alleged inability of appellants to controvert non-existent "assumption of fact", even though the record shows that all factual materials involved are matters of public record, and even though the State Courts at all three levels held that there were no questions of fact involved in this litigation?

(5) Is the due process clause of the Fourteenth Amendment violated because appellants never had a trial upon non-existing questions of fact, where all three levels of the State Courts held that there were no questions of fact involved in this litigation, and where all factual materials on which appellee based his action in *initiating* the reorganization procedures, are shown by the record to be matters of public record (such as school district boundaries, pupil population, assessed valuations, absence of high school facilities, etc., etc.)?

As the record and particularly the amended remittitur of the New York Court of Appeals show, none of these questions were before the State Courts.

It is well established that questions which were not before the State Courts cannot be raised, for the first time, on a review of the determination of the State Courts. (*Chicago Rwy. v. Railroad Commission*, 237 U. S. 220, 234; *Bullen v. Wisconsin*, 240 U. S. 625, 632; *Montana Railway v. Warren*, 137 U. S. 348, 351; *Old Jordan Mining Company v. Societi Anonym Des Mines*, 164 U. S. 261, 264; *Duignan v. U. S.*, 274 U. S. 195, 200; *Lawn v. U. S.*, 355 U. S. 339; *San Pedro, etc. Co. v. U. S.*, 146 U. S. 120, 136).

In a very recent series of decisions this Court has once again reaffirmed this general rule, and in a manner completely apposite to the cause here at bar.

The New York Court of Appeals in two related proceedings (one against the Board of Education of the City School District of the City of New York, and the other against the Board of Higher Education) denied a motion for amendment of its remittitur so as to show that certain Federal questions had been raised, except as to one member of one of the two groups of appellants there involved (Slochower, who was a member of the Shlakman group, in the proceeding against the Board of Higher Education). As to him alone an amendment of the remittitur was granted by the Court of Appeals to the extent indicated at 307 N. Y. 806. The remittitur had not been amended as to any member of the Daniman group (Board of Education), and consequently an appeal by the Daniman group was dismissed for lack of a properly presented Federal question, at 348 U. S. 933. A subsequent motion for leave to file a petition for rehearing was denied and the appeal dismissed for lack of jurisdiction, at 352 U. S. 950, in relation to the same Daniman group. As to Slochower, however, in relation to whom the remittitur had been amended, this Court noted probable jurisdiction, at 348 U. S. 935, and ultimately reversed the New York Court of Appeals order, at 350 U. S. 551.

It is respectfully submitted, therefore, that even if the appeal herein had been timely, the questions numbered "(1)", "(2)", "(3)", "(4)" and "(5)" on pages 5 and 6 of the Jurisdictional Statement herein are not before this Court.

Appellants claim that the mention of New York State Education Law, Section 1801, in the amended remittitur opens the door to bringing in the constitutionality of any of the ten sections of the article, of which Section 1801 happens to be the first section, *i. e.*, "Section 1801" should be read to mean "Article 37".

It is respectfully submitted that the New York Court of Appeals is fully capable of expressing itself concisely and accurately, and that the language used by that Court may not be extended beyond its plain and unambiguous meaning.

The first two questions are not before the Court, because they seek to raise the constitutionality of sections of the New York State Education Law, *other than Section 1801 thereof, i.e.*, the constitutionality of Sections 1802 through 1809, which the New York Court of Appeals did not consider. The remittitur refers only to Section 1801 l.c.

The first such question is particularly addressed to Section 1804, subdivision 5. That is the provision which states that the property of all component districts ("existing districts") in a central school district is retained by such component districts after centralization. It is the same subdivision which also provides for the payment of the bonded indebtedness by the component districts, after centralization. It is the following subdivision (§ 1804, subd. 6) which requires that, upon sale of the property of a component district, the proceeds must be used first to pay up any outstanding bonded indebtedness of such component district.

Appellants conveniently slide over any specific reference to said Section 1804 by the simple method of referring to "the centralization provisions of the New York State Education Law (§ 1801, *et seq.*) * * *". (Emphasis supplied).

The fact remains, however, that the New York Court of Appeals, according to its own statement in the amended remittitur, did not consider the constitutionality of Section 1804, but merely that of Section 1801. Hence, this

first question sought to be raised is not before this Court even if it had been raised in a timely fashion.

The second question, sought to be raised, suffers from the same defect. The reference, again, is to "Section 1801, *et seq.*", and, therefore, goes far beyond its proper limits.

The language used would, for instance, include any administrative action of appellee based on *Section 1806*, which deals with the State aid building quota, payable to central school districts from New York State funds. No such question was before the State Courts, of course.

It is admitted, however, that this second question here sought to be raised, (1) if the reference were limited to Section 1801 of the State Education Law, (2) if it had been raised on a timely appeal, and (3) if it were not precluded by previous decisions of this Court, would be a proper reflection of the remittitur of the New York Court of Appeals, and hence would be properly before this Court.

Appellants summarize the last three questions into a single question at page 18 of the Jurisdictional Statement as follows:

> "(3) Have appellants been deprived of their property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States by reason of their being deprived in this proceeding of a hearing upon the issues of fact raised by the pleadings in that the Commissioner ordered centralization without a hearing of any sort, without making any findings of fact, and without otherwise revealing to petitioners the facts upon which his determination rested, and in that the statutes in questions as applied in this proceeding impose a tax upon the individual appellants but at the same time prohibit them from controverting assumptions of fact on which that tax rests."

It must be noted in this connection that all three State Courts held that there was no question of fact presented by the record. It is assumed that the question whether or not questions of fact are presented in any given litigation is also deemed a question of fact and must, consequently, be deemed to be conclusively settled by the determination of the highest State Court, to the exclusion of the jurisdiction of this Court. In any event, no Federal question is presented in this connection. Nor is a Federal question presented by appellants' allegations that "assumptions of fact" were made by appellee, which allegations are not borne out by the record.

It must be remembered that all the factual materials on which appellee based his determination are indisputable matters of public record, such as school district boundaries, number of pupils enrolled, existing facilities, birth records, taxable values, roads, distance between various points in the area and other similar matters. The only dispute in such case can relate to the conclusions to be drawn from such factual materials. The statutory discretion to make such conclusions rests in appellee, and hence such disputes merely raise questions of law.

Nor is a Federal question presented based on appellants' allegations that "they did not know" the basis for appellee's order. As indicated hereinabove, appellants are charged with knowledge of the law, inclusive of Section 314 of the State Education Law which charges appellee with initiating school district reorganizations found by him to be necessary in the educational interest of the children of the area involved. Appellants also know that the record herein contains various items returned by appellee, setting forth various details upon which appellee's determination was based. The State Courts properly passed on

appellants' contention, which can hardly be taken seriously, that in spite of appellee having made and caused to be made such studies of matters of public record, that he did not rely upon the same in making his determination.

It is, therefore, respectfully submitted that none of the five questions sought to be presented on this appeal, even if the appeal had been timely, are before this Court, in any event, and that the appeal must be dismissed, on this ground as well.

III.

The appeal herein does not present a substantial Federal question.

It is respectfully submitted that even if this appeal had been brought in a timely manner, and even if all five questions listed by appellant were properly before this Court, the finding of any substantial Federal question is foreclosed by a multitude of prior decisions of Federal Courts, and particularly of this Court, which have already determined all issues purported to be raised herein by appellants.

1. Statutory Background

The school districts of the State were first established in 1812. As education became more complicated, and included more and more fields of subject matter, it became obvious that the originally very small school districts, of which there were over 11,000 in the State around the middle of the last century, were inadequate as bases for proper local educational programs, both from the standpoint of sufficiency of the tax base and from the standpoint of

the sufficiency of the number of pupils to allow a broad program on an economical basis. Hence in 1853 the so-called Union Free School District Act was passed, which authorized *consolidation* of several common school districts to form a union free school district for the purpose of establishing and operating a high school. The principles underlying this legislation were to the effect indicated today by Education Law, Sections 1514, 1517 and 1518. Under these provisions in the case of *consolidation*, the entire property of all component districts spreads to the newly formed union free school district as does all bonded indebtedness, while only current bills such as for coal and other supplies have to be paid by the individual component district. This system, however, proved inadequate to the needs, because obviously a district which had good facilities was not agreeable to consolidation with a district that did not. Similarly, a district which had no bonded indebtedness would not wish to consolidate with a district or districts which had a high bonded indebtedness which was to spread over the entire new district and which, therefore, the debt-free district had to assume in part. As a result of this, comparatively very few such union free school districts were actually established. Consequently, at the beginning of the current century various new schemes for school district reorganization were contemplated and tried, with the result that the present central school district provisions (*"centralization"*) finally became the accepted standard for school district reorganization in this State.

Since 1925 over 96% of the nonurban area of the State has been reorganized into over 500 central school districts, resulting in the reduction of the then about 10,000 school

*districts of the State to just over 1300**. Beginning in 1925, also, a great deal of additional State aid was granted to these central school districts as an incentive to their formation. Only central school districts, for instance, receive a so-called State aid building quota, under which, depending on the wealth of the district, a new central school district may receive up to 60% and 80% of its building costs through direct State aid. This aid is in reverse proportion to the wealth of the district. It was both this and various other substantial additional state aid grants and the feature of the central school district law which allowed the component school districts to retain title to all their property, but at the same time also required them to pay all indebtedness themselves by an additional levy over and above the current central school district operating levy, which have been so successful, through its reorganization program, in bringing the New York State School System to the forefront of quality in the United States.†

The retention of property rights of the component districts in their schools and other facilities results in a situation where, upon the sale of such buildings and facilities, the proceeds must be used first to pay up existing bonded indebtedness of the component districts and any remainder of such proceeds must be reapportioned to the taxpayers

* While it is realized that this is not an argument on the law, it must, nevertheless be pointed out, as a practical matter, that a finding of unconstitutionality of Education Law, § 1801, under which this vast percentage of the New York State School System has been reorganized over so many years, would create the gravest possible problems relating to the many millions of dollars of all central school district bond issues and tax levies over the years, the re-creation of all the old component districts, the entire educational programs in the central districts, title to all central school district properties and a multitude of other related matters.

† Cf. The Child, The Parent and The State, James Bryant Conant, p. 174, n. 6.

of the component school district, unless *they* vote to turn such remainder over to the central school district for central school district purposes. It will be noted thus that while the components who have bonded indebtedness must pay such indebtedness themselves, at the same time they also retain title to all their property, which may not be disposed of by the central school district, except with the consent of the voters of the component district. In fact, under Section 1805, the schools of the component districts which are in operation at the time of centralization may not even be closed except with an approving vote of the voters of such component district.*

It is obvious that for a good program and one that can be sustained by the taxpayers, it is necessary that a certain number of pupils is required so as to insure the required variety of educational offerings, and further that enough taxable wealth be available so as to make the provisions of such programs economically feasible.

The process of reorganization is, of course, often opposed by taxpayers of high value areas who do not wish to participate in the problems of the larger community of which they, nevertheless, are a part.

The State Constitution makes it mandatory that every child be provided an education system in which he may be educated at public expense. This is so regardless of whether there are many or few pupils involved. Also, it would be administratively impossible to operate a State Education System in which there are left islands of high valuation or islands of areas with few pupils, while the rest of the State must carry the burden of educating their

* Under recent legislation a central district now may close such schools five years after centralization or five years after the last vote of the voters of the component district not to close such schools.

own children as well as those of such islands. This is essentially the position of appellants. They contend that because they have only 20 pupils in Grades 9 through 12, although they have an additional number of pupils in the 7th and 8th Grades which are high school grades, and because their valuation is comparatively high, that they are immune to the Constitution of the State of New York and immune to the process of school district reorganization.

2. Events Leading to Appellee's Order

Appellee's order was made in the regular course of the customary procedures leading to reorganizations for the establishment of central school districts.

The situation in Long Island, particularly, is becoming more and more acute because of increases in population. This suburban area is absorbing more and more people moving out of New York City. As a result thereof, the shortage of classrooms and other school facilities is increasing. Against this background and in line with these tendencies in this specific area, the reorganization problems of this group of school districts was studied and evaluated by appellee. The customary pattern of field trips, correspondence, conferences locally and in Albany were had, the financial situation was carefully evaluated in relation to resources and possible patterns of programs. The enrollment situation was carefully studied with the same purpose in mind. The geography of the three districts in question provides a compact and contiguous territory lending itself well to the establishment of a central school district out of the three districts in question.

"Brookville" lies between a presently existing central school district and the other two districts in this group

which are particularly in immediate need of school facilities for all students. Hence, to exclude "Brookville" from this reorganization would leave a gap or an "island" and, in addition, would fail to accord proper consideration to the 20 pupils residing in "Brookville" who do attend the public high schools between Grades 9 and 12.

"Brookville" admittedly has 20 students in Grades 9 through 12 now attending public schools. To these must be added those students in Grades 7th and 8th, which are also high school students, and for which "Brookville" now provides through an 8th Grade program. Even though 20 students in Grades 9 through 12 are a small number compared with the students in that category in the other two districts, nevertheless even a small number of students is constitutionally entitled to a free public school education and, likewise, even a small number of students will have trouble finding places in districts other than those of residence, in view of Education Law, Section 3202, subdivision 2, which provides that a school district is authorized, but not required, to accept nonresident students and even then only on such terms as the local board of education may see fit to require. Appellee's responsibility goes to all children of the State, whether their specific numbers are small or large. There was nothing unusual about the procedure by which this centralization was initiated by appellee under the statutory provisions applicable. It is not unusual to have high valuation areas included with low valuation areas in reorganizations. This, indeed, becomes necessary if the area otherwise forms a natural part of a community, unless high valuation areas are to be omitted throughout the State from all school district reorganizations because of their valuation alone. This, obviously, could not be done on any basis.

Appellants allege that appellee "admitted" to have used non-statutory standards in his studies and other materials returned herein. There is no basis for such an allegation. The statutory standards are to the effect that appellee is to include "only territory of suitable size conveniently located for the attendance of pupils and having a sufficient number of pupils for the establishment of a central school."

The items referred to in appellee's studies and return comprise the details for the criterion "of suitable size" which, quite obviously, is not limited to acreage, but must also include such matters as valuation, population, density, communications systems, etc. Other items therein refer to the question of "convenient location for attendance of pupils" and "sufficient number of pupils". It is, on the contrary, the contention of appellee that the materials returned herein were in direct support and explanation of, and in compliance with, the said statutory standards.

It is respectfully submitted that appellee used every possible care, diligence and his best judgment under the statutory procedures, and in full compliance therewith, in order to arrive at the best possible solution for the provision of educational facilities for this community.

In this connection it should further be pointed out that appellants' allegations as to a "watering down" of educational offerings in "Brookville", "disruption" of "Brookville's" educational system and the like are purely speculative and have no basis in established fact. In this connection, Judge Brennan's Opinion is apposite when he says:

> "It is also uniformly recognized that 'A genuine and present controversy, not merely a possible or conjectural one must exist—' to sustain jurisdiction. Gully v. First National Bank, 299 U. S. 109, 113 [;] Koster v. Turchi, 173 F. 2nd 605."

3. Effect of the New York State Statutes on the new Central School District

It is an indisputable fact that none of the three districts included in this reorganization has its own high school facilities. The purpose of a reorganization of this type is mainly to provide high school facilities of its own for the community.

Appellants complain of "disruption of its educational system" and similar conjectural matters. These must be viewed against the New York State statutes under which the new central school district is required to operate.

Under New York State Education Law, Section 1805, the new central school district must continue the operation of the "Brookville" elementary school until the voters of "Brookville" vote to close the school, or until five years from the effective date of the centralization. Even then, with the increasing enrollments, it is a foregone conclusion that the new district will not be able to close that school.

Education Law, Section 1804, subdivision 5, guarantees to "Brookville" its property rights to its school, including site, buildings and contents. If these are ever to be sold and "Brookville's" bonded indebtedness is by that time still outstanding, subdivision 6 of said Section 1804 provides that the proceeds of such sale must first be used to pay up such bonded indebtedness. The subdivision further provides that any balance of said proceeds must be returned to the taxpayers of "Brookville" as they appear on the last completed town assessment roll prior to the date of sale, unless the "Brookville" voters themselves vote to turn over such balance to the central school district.

In addition, Section 1806 provides a formula for the apportionment of State funds to central school districts, specifically for building purposes. The formula, ourse, provides for larger payments to poorer districts and smaller payments to the wealthier districts, but nevertheless the building quota may amount to substantial sums, thus relieving the local taxpayers, *pro tanto*, of the burden of the construction of the new facilities for the new central school district.

Furthermore, if "Brookville's" bonded indebtedness was contracted before 1947, subdivision 4 of Section 1806 provides for payment by the State of the entire debt service on such individual district indebtedness of "Brookville", minus two mills on true value.

Furthermore, "Brookville", to the extent that members of the central school district may be elected from among its own residents, will have a measure of control over the affairs of the new central school district. Presently they have no control over the fate of the high school students attending other school districts, except through possible contractual arrangements predicated entirely upon availability of space which is becoming more and more scarce in the area.

It is, consequently, respectfully submitted that appellants' contentions to the effect that they are getting no benefit whatever from this reorganization are wholly untenable. It is probably true, however, that the comparative amount of benefits to be derived by "Brookville" may be smaller than that derived from the centralization by the other two districts therein. The system, however, under which all burdens of sustaining governmental services are made absolutely equal for all citizens of the community,

be it local, State or otherwise, has not yet been invented (*Kelly v. Pittsburgh*, 104 U. S. 78).

Appellants make mention of the fact that the New York State Education Law requires component districts to pay their own indebtedness. In support of their position that this provision raises a Federal question, they rely on *Attorney General of the State of Michigan ex rel. Kies v. Lowrey*, 199 U. S. 233. This case, however, clearly supports appellee instead of appellants. The Michigan statute involved in that case admittedly spreads the debts of the component districts over the entire new central school district. *At the same time, however, that statute vested title to the property of all component districts in the new central district as a corollary to such spreading of the debt.*

It is respectfully submitted in this regard that even if the question of the constitutionality of subdivision 5 of Section 1804 were before this Court, which, of course, it is not, that this case by no means supports appellants' position in this case, but that, on the contrary, at least by clear implication, it supports appellee on this point.

4. Prior Holdings of the New York State Courts Relating to the Constitutionality of Education Law, Section 1801

The constitutionality of New York State Education Law, Section 1801, has heretofore been upheld in the following cases:

Gardner v. Ginther, 232 App. Div. 296; aff. 257 N. Y. 578;

Board of Education v. Wilson, 277 App. Div. 809; aff. 303 N. Y. 107;

Monaco et al. v. Allen, 5 A. D. 2d 743; 4 N. Y. 2d 1032.

5. Prior Holdings of Federal Courts and the United States Supreme Court in similar cases

(a) The questions before this Court have already been determined by a Federal Court, *i.e.*, the United States District Court for the Northern District of New York, in which an opinion was rendered by Judge Brennan in 1949. Since the case is not reported, the full text of the opinion is attached hereto as "APPENDIX A" and made a part hereof.

(b) This Court held in *Highland Farms Dairy v. Agnew*, 300 U. S. 608 at 612 as follows:

> "How power shall be distributed by a State among its governmental organs is commonly, if not always, a question for the State itself."
>
> *Laramie County v. Albany County*, 92 U. S. 307, and many cases cited;
>
> *Worcester v. Street Railway*, 196 U. S. 539.

(c) Where remedy exists in State Courts concerning a matter primarily of State Law, the Federal Courts will hesitate to assume jurisdiction under the principles of comity.

> *Defiance Water Co. v. Defiance*, 191 U. S. 184;
> *Shanks v. Banting Manufacturing Co.*, 9 F. 2d 116;
> *New Orleans v. Benjamin*, 153 U. S. 411, 424.

(d) Jurisdiction must be based on genuine and present controversies, not merely possible or conjectural problems.

> *Gully v. First National Bank*, 299 U. S. 109, 113;
> *Koster v. Turchi*, 173 F. 2d 605.

(e) *A finding of a substantial Federal question is foreclosed herein by decisions which this Court has made on the issues here involved.*

It is well settled law that the jurisdiction of this Court is foreclosed where the Federal question presented is plain-

ly unsubstantial because the question has been settled by prior decisions of this Court, so that the question can no longer be the subject of controversy.

In the words of Mr. Justice Sutherland in *Levering & Garrigues Co. et al. v. Morrin et al.*, 289 U. S. 103, the Federal question here alleged is "plainly unsubstantial * * * because its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy."

To the same effect are:

California Water Service et al. v. Redding et al., 304 U. S. 252;
Hannis Distilling Company v. Baltimore, 216 U. S. 285, 288;
McGilvra v. Ross, 215 U. S. 70, 76, 77-80;
Norton v. Whiteside, 239 U. S. 144;
Bianchi v. Morales, 262 U. S. 170;
Leonard v. Vicksburg S. & P. R. Co., 198 U. S. 416, 421 and cases cited therein;
Delmar Jockey Club v. Missouri, 210 U. S. 324, 335.

(f) As far as the questions themselves are concerned, the following cases have heretofore been decided by this Court, thus foreclosing the subject.

In *Newton v. Commissioners*, 100 U. S. 548, this Court upheld the power of a State to provide for the moving of a County seat, in spite of the locality having expended considerable sums to build a Courthouse, because of the absolute police power of the State over its subordinate or municipal corporations or other public bodies. The deci-

sion also affirmed the complete power of the State over all public offices within its reach which may be at pleasure created or abolished.

In *Mount Pleasant v. Beckwith*, 100 U. S. 514, this Court upheld the right of the State of Wisconsin to abolish a town and annex its territory to two other towns and thereafter to annex a piece of one of the newly reorganized towns to a city, without making any rules as to transfer of indebtedness. This case is particularly apposite to appellants' claims in relation to the requirement of the New York State law that each component school district must continue to pay its own indebtedness. The Court stated at page 525 as follows:

> "Debts previously contracted must be paid entirely by the old corporation, nor has the new municipality any claim to any portion of the public property except what falls within her boundaries, and to that the old corporation has no claim whatever. Laramie County v. Albany County, 92 U. S. 307."

This holding relates to a case where no statutory regulation is made relating to the transfer or retention of indebtedness.

In this connection it will be remembered that in *Attorney General of the State of Michigan ex rel. Kies v. Lowrey*, 199 U. S. 233, this Court held that there was no constitutional question presented in the case of centralization of school districts under a Michigan statute where all property vested in the new school district and all indebtedness of component school districts spread over the new district.

In *Kelly v. Pittsburgh*, 104 U. S. 78, this Court upheld the power of the State of Pennsylvania to set a part of the Town of Alleghany into the City of Pittsburgh against

the claim of the owner that this violated due process under the Fourteenth Amendment because of the imposition of city taxes on a farm. This case expressly refers to school taxes and the Court stated that as long as the tax was levied for a public purpose, this raised *no constitutional question, even though the owners of the farm might derive a smaller benefit than the owners of other property in the city*, the Court stating that a school tax had to be paid as well by those in the city who have no children.

The Court there indicated that it was not concerned with comparing benefits as a basis for the raising of a constitutional question. This case is apposite, therefore, while the case cited by appellants as a proper basis for jurisdiction of this Court (*Myles Salt Co. v. Board of Commissioners*, 239 U. S. 478) is completely irrelevant in this connection. In that case the Court found that the property in question was not, and in fact could not be, benefited at all by the extension of the drainage district to such land. In fact the Court found that the land in question was not, and could not be, benefited directly or indirectly. The Court was careful to point out, however, that "*We are not dealing with disputable grounds of discretion or disputable degrees of benefit, but with an exercise of power determined by consideration not of the improvement of plaintiff's property but solely of the improvement of others,—power, therefore, arbitrarily exerted imposing a burden without a compensating advantage of any kind*" (Emphasis supplied).

Another completely apposite decision of this Court was made in *Hunter v. Pittsburgh*, 207 U. S. 161. Here the city of Alleghany was annexed to the city of Pittsburgh under a unit vote statute where the entire enlarged area voted as a unit under circumstances where the voters of

the smaller city were completely outvoted. The unit vote is the basis also of the establishment of the New York State central school district. In that case the due process argument was made, as it is here by appellants, and this Court completely disposed of the question by stating that the State by realignment of the territorial limits of a municipal corporation may shift real property to a new or different tax district without creating a Federal question, and that the method of voting there involved raises no constitutional question.

A similar decision was made in the case of *Cole et al. v. Norborne Land Drainage District*, 270 U. S. 45. Here the question involved related to a tax for drainage where land was added to a drainage district in Missouri against the wishes of the owner under the claim that this was a tax for benefits they did not share. Mr. Justice Holmes held, writing for the Court, that no violation of the due process clause was involved.

Appellants also seek to base their claim to jurisdiction of this Court on the case of *Securities and Exchange Commission v. Chenery Corporation*, 332 U. S. 194. Again, this case on the contrary supports appellee's position. The Court stated, at page 207, as follows:

> "The facts being undisputed, we are free to disturb the Commission's conclusion only if it lacks rational and statutory foundation."

From the discussion hereinabove it seems abundantly clear that appellee based his determination on a fully reasonable and rational basis and fully complied with the statutory requirements and procedures of the New York State Education Law in making his order of March 29, 1957, which is here under attack. The State Courts

unanimously determined that there was no dispute as to the facts, as the record shows.

It is, therefore, respectfully submitted that even if this appeal had been brought in a timely fashion, and even if all questions allegedly presented upon this appeal were properly before the Court, nevertheless the Federal questions sought to be presented, are plainly unsubstantial in that they have been completely foreclosed by large numbers of prior decisions of this Court, so that these questions can no longer be the subject of controversy in this Court.

CONCLUSION

For the foregoing reasons it is respectfully urged that the appeal herein should be dismissed.

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APPENDIX A.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

—o—

LEONARD W. JENNE, ROY D. MILLS, RAYMOND L. MALONEY, MABEL B. JENSEN, MILTON DOUGHTON, LESLIE HORNER, LELA BETTIS, WALTER HALKO, STEVE G. ORMAN, THELMA S. HEFFER, individually and as Trustees respectively of Common School Districts Lysander #1, Lysander #11, Van Buren #4, Van Buren #2, Lysander #14, Lysander #2, Van Buren #9, Lysander #10, Lysander #1, all of the County of Onondaga, State of New York,

Plaintiffs,

vs.

STATE OF NEW YORK and FRANCIS T. SPAULDING, Commissioner of Education of the State of New York,

Defendant.

—o—

Appearances:

Furcinito & Rinaldo, Attorneys for Plaintiffs, S. A. & K. Building, Syracuse, New York, Mr. Charles R. Rinaldo, of Counsel.

Hon. Nathaniel L. Goldstein, Attorney General of State of New York, Attorney for Francis T. Spaulding, Comr. Education of the State of New York, Albany, New York, Ruth Kessler Toch, Asst. Attorney General, of Counsel.

Motion to Dismiss.

Argued May 17, 1949, Submitted May 19, 1949, Decided May 24, 1949.

BRENNAN, Judge.

Appendix

Opinion.

The plaintiffs bring this action as individuals and trustees of certain common school districts located in the Towns of Lysander and Van Buren, Onondaga County, New York, to restrain the defendant, as Commissioner of Education of the State of New York, from proceeding in accordance with the provisions of Article 37 of the Education Law of the State of New York, (referred to in the complaint as Article 33), in the matter of the formation of a central school district. The crux of the action is the alleged unconstitutionality of the pertinent provisions of the Education Law of the State.

The present status of the action is as follows. A complaint was heretofore filed with the Clerk of this Court. A summons was issued and the defendant has appeared but has not yet answered. The original complaint prayed for temporary and permanent injunctions restraining the defendant from issuing an order under the provisions of Section 1801 of the Education Law which, in effect, would designate a certain territorial area which might later ripen into a legally functioning centralized school district, in accordance with the procedural provisions of the Law. Assuming the jurisdiction of this Court, the issuance of an interlocutory or permanent injunction required the convening of a three-judge court in accordance with the provisions of Title 28 U. S. C. 2281, etc. A temporary restraining order was applied for and was denied under the provisions of Title 28 U. S. C. 2284, subdivision 5. Upon the hearing relative to the temporary restraining order, the question of the jurisdiction of this Court was raised by the defendant, and since such question appeared to

be serious, a date was set for argument thereon. Prior to the date of argument the plaintiff served an amended complaint. The amendment made did not appear to obviate the objections to jurisdiction, so that argument was addressed to the amended complaint; briefs were filed, and the question is submitted for decision.

Upon the argument the power of a single judge to determine jurisdiction in this case was raised by the plaintiffs. It is understood that such question is no longer seriously urged, and no further discussion thereof is necessary, except to state that the reported cases seem to be uniform in holding that the matter of the convocation of a three-judge court, is one of legal concern and practical importance, and that it is the duty of the judge to whom the application for an injunction is presented to scrutinize the complaint and determine whether or not jurisdiction exists.

Ex parte Porseky, 290 U. S. 30;
Carras, *et al.* vs. Monoghan (Dravo Corp., Intervener), 65 F. Sup. 658;
Priceman v. Dewey, Gov. *et al.*, 81 F. Sup. 557.

The amended complaint now before the Court is not a model of pleading. Its first allegation is "The action arises under the Fourteenth amendment of the Constitution of the United States, as hereinafter more fully appears." It is, therefore, definite that plaintiffs depend upon the existence of a question in this action which arises under the Constitution of the United States. The basis of jurisdiction, therefore, must be found in Title 28 U. S. C. 1331, which provides in substance that the district courts shall have original jurisdiction of all actions where the matter in controversy exceeds the sum or value of three

thousand dollars, exclusive of interest and costs, and arises under the Constitution of the United States. The section by its language requires, (a), that the matter in controversy exceeds the sum or value of three thousand dollars; (b), the existence of a constitutional question. Recourse must be had to the complaint to determine whether or not such elements are found therein.

Nowhere in the complaint is there any allegation of a money loss to the plaintiffs, either individually or collectively. No attempt is made to allege in any manner the value of the rights which plaintiffs claim are affected or presently endangered. The language of the statute upon which plaintiffs depend to give this Court jurisdiction requires that it must be pleaded that the matter in controversy exceeds the sum or value of three thousand dollars. If such an allegation be challenged, the plaintiffs must support same by proof. Hence, it appears without question that the complaint is insufficient on its face. The following quotation is applicable here.

> "The prerequisites to the exercise of jurisdiction are specifically defined and the plain import of the statute is that the District Court is vested with authority to inquire at any time whether these conditions have been met. They are conditions which must be met by the party who seeks the exercise of jurisdiction in his favor. *He must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations he has no standing.* If he does make them, an inquiry into the existence of jurisdiction is obviously for the purpose of determining whether the facts support his allegations" (Emphasis supplied).
>
> McNutt v. General Motors, etc. Corp., 298 U. S. 178 at 189.

Appendix

The following decisions with the cases cited therein are additional authorities for the conclusion reached above.

American Distilling Co. v. City of Sausalito, 73 F. Sup. 520;

Troy Laundry Co. v. Lockwood, 63 F. Sup. 384;

Buck v. Case, 24 F. Sup. 541 (Reversed on procedural grounds 307 U. S. 95).

The decision might end here, but since the existence of a constitutional question was argued and briefed by the parties, it is deemed advisable to resolve the conflict to avoid further unnecessary litigation.

Plaintiffs seem to rely upon their status as (a), trustees of common school districts possessing powers and charged with duties as provided by the Education Law of the State; (b), as voters within their particular school districts; (c), as taxpayers and real estate owners within their particular autonomous school tax area. They allege in a somewhat conclusive manner that their rights and their properties will be adversely affected if the defendant should make and enter in his office an order laying out territory which would include their properties in a proposed new central school district, as authorized by Section 1801 of the Education Law. Upon the argument the Court was impressed that the plaintiffs' principal claim was that the statute under consideration constitutes an unlawful delegation of power to the defendant Commissioner; that such delegation is in violation of the United States Constitution.

An examination of the statute involved discloses that the proposed action of the Commissioner is but an administrative act or a procedural means which will afford a basis

for further action by the qualified voters within the territory affected.

After the order above referred to is filed, the statute provides that a petition *may be* presented by the required number of qualified voters, which petition in substance requests that a central school district be organized or established embracing the territory referred to in the order. The petition is to be filed with the Commissioner, and if he finds same to be in accordance with law, he shall fix a time and place for a meeting of the qualified voters of the proposed district. At such meeting, the voters may by their votes adopt or reject the proposed establishment of a central school district. In the event that centralization is rejected, then the common school districts, and the officers thereof, such as represented by the plaintiffs herein would be unaffected. In the event that centralization is adopted, the statute provides in some detail for the functioning thereof, and the consolidation of the common school districts therein. The burden of plaintiffs' complaint is that the anticipated order of the Commissioner which has not yet been issued—although it is undisputed that the issuance of such an order is contemplated—would set in motion proceedings outlined above, which would result in plaintiffs' damage. It seems clear, however, that no actual damage can flow from the issuance of the order, since it has no force until and unless three subsequent events happen: (1), the inhabitants of the district desire to submit the question of centralization to a vote of the inhabitants and they express such desire in the form of a petition as provided by statute; (2), the Commissioner finds the petition sufficient under the law and designates a time and

place for a meeting of the voters of the area affected; and (3), the voters at such meeting by their votes favor the centralization of the area for educational purposes.

The allegations and inferences of the complaint and the statements made upon argument that these plaintiffs would be deprived of the office of trustee in their respective school districts; that the power of their votes as constituent members of their individual school districts will be lost; that they will be adversely affected by the creation of a new school tax district, are all theoretical rather than definite, and depend upon action in the future by the voters of the district which no one can successfully foretell, and concerning which this Court is not allowed to speculate.

The constitutionality of the sections of the Education Law of the State has been directly passed upon in the state courts. (Gardner v. Ginther, 232 A. D. 296; affirmed without opinion in 257 N. Y. 578.) The opinion discusses the question at length and with clarity. It, in effect, holds that the action of the Commissioner complained of herein is an administrative and not a legislative act. The history of the Education Law of the State is outlined therein in a clear and persuasive manner. The State must legislate within the framework of the United States Constitution, and the decision in the cited case is highly persuasive here.

> "How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself."
>
> Highland Farms Dairy v. Agnew, 300 U. S. 608 at 612.

The existence of a federal or constitutional question is the subject of many judicial decisions covering a long period

of time. It may be correct that all judicial precedents may not be reconciled, but it seems to be well recognized that where a remedy exists in state court concerning a matter primarily of state law, the federal courts will hesitate to assume jurisdiction under the principles of comity.

> Defiance Water Co. v. Defiance, 191 U. S. 184;
> Shanks v. Banting Mfg. Co., 9 F. 2nd 116;
> New Orleans v. Benjamin, 153 U. S. 411, 424;

It is also uniformly recognized that "A genuine and present controversy, not merely a possible or conjectural one must exist * * *" to sustain jurisdiction.

> Gully v. First National Bank, 299 U. S. 109, 113;
> Koster v. Turchi, 173 F. 2nd 605.

Here, as in American Distilling Co. v. City of Sausalito, *supra*, any injury is subject to a condition precedent; to-wit; the ratification by the voters of the discussed plan, which, of course, may never occur. (See also Highland Farms Dairy v. Agnew, *supra*.)

In determining jurisdiction here the finding of a substantial federal question may be foreclosed by decisions which have already determined the issues raised. (Levering & G. Co. v. Morrin, 289 U. S. 103; Water Service Co. v. Redding, 304 U. S. 252.) An examination of the issues sought to be raised in the complaint indicates that such a situation exists here. Same will be briefly referred to. The office of trustee may be abolished or the duties thereof modified. (Newton v. Commissioners, 100 U. S. 548 at 559.) Municipal corporations created by the authority of the State Legislature are subject to the control of the state creating them. (Mt. Pleasant v. Beckwith, 100 U. S.

514, 534.) The State by re-alignment of the territorial limits of a municipal corporation may shift real property to a new or different tax district. (Kelly v. Pittsburgh, 104 U. S. 78; Hunter v. Pittsburgh, 207 U. S. 161, 179.) The method of voting upon the question of centralization raises no constitutional question. (Hunter v. Pittsburgh, *supra*, at 177; Cole v. Norborne Drainage Dist., 270 U. S. 45.)

As seems to be peculiar to this type of action affecting inhabitants of a comparatively small territorial area, this case has prompted arguments which are of no force, and the motives and actions of the champions of opposing forces are of no concern whatever. The question is solely one of jurisdiction, and that question alone is decided here.

As indicated above, this Court is without jurisdiction, and the complaint must be dismissed.